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No. 87-1504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD O. LOENGARD, JR., JOHN BORG LOENGARD and URSULA L. BERENS, individually and as Executors of the ESTATE OF MARGERY BORG LOENGARD, Deceased; THE BANK OF NEW YORK, Trustee of the Trust for the Benefit of DOROTHY BORG under the Will of SIDNEY C. BORG, Deceased; FRANCES M. BORG, DONALD C. BORG and WILLIAM FURTH as Executors of the Estate OF JOHN S. BORG, Deceased; and SYLVIA T. YARROW,
Petitioners,

v.

SANTA FE INDUSTRIES, INC.,
SANTA FE NATURAL RESOURCES, and
KIRBY LUMBER CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY BRIEF

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April 22, 1988

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REPLY QUESTION

1. Can there be any doubt that this Court has jurisdiction to review the constitutional question and should exercise its authority and discretion accordingly given the egregious ruling below in which the Second Circuit completely reversed itself?

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PETITIONERS' REPLY BRIEF

Point I

This Court Should Use Its Authority and Exercise Its Discretion to Review the Constitutional Question Given the Extraordinary Circumstances of the Second Circuit's Complete Reversal of its Position in this Case Which Resulted in a Denial of Due Process of Law.

There can be no doubt that the Supreme Court has the authority and may exercise its discretion to address a substantial constitutional question despite the fact that

it was not explicitly presented below. This Court has recently acknowledged "consideration of issues . . . not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980) *citing inter alia Blonder Tongue Inc. v. University Foundation*, 402 U.S. 313 (1971) and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). While the Court ordinarily does not decide questions not raised below, "the rule is not inflexible." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).[1] The complete reversal by the Second Circuit and the abandonment of its original holding of fraud (despite a recent reaffirmation) surely constitute extraordinary circumstances which justify relaxation of the ordinary rule.

This Court is well aware of the numerous and varied circumstances in which it has been the first court to resolve constitutional questions. *See e.g., Thigpen v. Roberts*, 468 U.S. 27 (1984) (due process violation).

The procedural history of petitioners' claim for breach of fiduciary duty under Delaware law assumes particular significance. As will be immediately obvious, there was *no* opportunity prior to the Second Circuit's adverse decision at which it would have been reasonable for petitioners to raise their constitutional argument. At the district court level, petitioners' claim was dismissed as time-barred under a three year statute of limitations on respondents' motion for summary judgment. The merits of the claim were not at issue. On appeal, the Second Circuit certified to the New York Court of Appeals (because New York law was controlling on this issue) the question of the applicable statute of limitations (9a). In that Order, which also certified the question of fraud

[1] In *Youakim*, the Court utilized its flexibility to justify vacating the judgment below and remanding for consideration of the constitutional question.

under the New York Martin Act, the Second Circuit reaffirmed its original holding of fraud in the subject merger transaction. It stated in no uncertain terms that the merger involved fraud and that that conclusion was not affected by the decision of this Court which rejected the Second Circuit's legal theory under the Securities Exchange Act of 1934 (5a-6a). The New York Court of Appeals answered the certification by finding the six year statute of limitations applicable. Thus, on return to the Second Circuit, petitioners' breach of fiduciary duty claim was not time-barred and could be considered on the merits. At this point, petitioners made a motion for summary judgment, arguing that, given the controlling holding of fraud by the Second Circuit, petitioners were entitled to summary judgment (at least on liability).

Although petitioners did not characterize their claim in constitutional terms, petitioners had no reason to raise or foresee a constitutional deprivation at that point. The Second Circuit had recently reaffirmed its holding of fraud, recognizing that that conclusion of "fraud" stayed in place regardless of the legal theory (5a-6a). Under controlling Delaware law, respondents would be liable for breach of fiduciary duty given that fraud. Thereafter, with the complete and inexplicable abandonment of its conclusion of fraud, the Second Circuit first injected the constitutional issue into the case with its issuance of the November 12, 1987 order which petitioners ask this Court to review (1a-3a).

Thus, petitioners could not reasonably have been expected to anticipate and advance the constitutional argument. Stated otherwise, the question might be whether petitioners have waived their constitutional objection. The answer must be a resounding "NO" because an effective waiver must be the knowing relinquishment of a right or privilege. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Where the constitutional violation could not reasonably have been anticipated, there could be no meaningful waiver of the right to raise the argument. *Cf. Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143-45 (1967) (no waiver of constitutional defense in libel action by failure to raise it before trial where *New York Times v. Sullivan*, 376 U.S. 254 (1964) had not yet been decided, and following adverse judgment and the *New York Times* decision, the defendant moved for a new trial).

In sum, petitioners had no reason to have anticipated the need to raise a constitutional question as long as the conclusion of fraud was part of the case. When the Second Circuit abandoned that holding, the constitutional deprivation arose. Thus to review meaningfully the decision of the Second Circuit, this Court must consider the constitutional question.[2]

Significantly, the cases cited by the respondents do not suggest that the writ should be denied in this case. For example, *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19 (1986), was an administrative law case involving an explicit statute stating that objections not raised in proceedings before the Federal Labor Relations Authority were not reviewable in court, absent extraordinary circumstances:

> No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances.

5 U.S.C. sec. 7123(c).[3] The particular legislative intent that administrative agencies first pass upon issues in-

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[2] Although petitioners could have petitioned the Second Circuit for a rehearing, such a petition is in no sense a prerequisite to the instant petition for certiorari.

[3] The Supreme Court faulted the EEOC for failing to offer *any* excuse for its failure to raise its objections.

volving their expertise is totally absent from this case. Further, the statutory language quoted in *EEOC* is virtually identical with that found in sec. 10(e) of the National Labor Relations Act, 29 U.S.C. sec. 160(e), which had been interpreted as being a jurisdictional prerequisite:

> This Court has interpreted sec. 10(e) to mean that a Court of Appeals is "*without jurisdiction* to consider" an issue not raised before the Board if the failure to do so is not excused by extraordinary circumstances.

EEOC v. FLRA, *supra*, 476 U.S. at —, 90 L.Ed.2d at 23 (emphasis added) (citations omitted). In this case, there can be no question that the Supreme Court has the *jurisdiction* to grant the petition for writ of certiorari if it chooses to exercise its discretion accordingly.[4]

Point II

Petitioners Have Standing to Raise the Constitutional Challenge to Delaware Law.

Petitioners' position is that Delaware law offered them no adequate remedy by forcing them to choose between two grossly inadequate alternatives: 1) the appraisal remedy (which does not result in fair value) and 2) the common law claim for breach of fiduciary duty which has been rendered meaningless under the Second Circuit's in-

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[4] *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981) is likewise distinguishable. Where the main issue was the proper interpretation of the cost-shifting provision of Fed. R. Civ. P. 68, this Court refused to consider the question of an abuse of discretion by the *district judge* denying costs under Rule 54(d) which was raised for the first time in the Supreme Court. By contrast, in the petition *sub judice*, the constitutional question which goes to the core of the case first arose from the decision of the Court of Appeals.

In *United States v. Santana*, 427 U.S. 38, 41 n.2 (1976), the Court noted in passing that the "Government did not raise [the standing] issue below and consequently we do not reach it." Significantly, the Government did not raise the question in the Supreme Court either.

terpretation. The choice of these two alternatives results in the constitutional deprivation of property without just compensation. There can be no doubt that the rules on standing do not require petitioners to participate in the meaningless appraisal proceeding to raise the instant challenge. The judicial system neither requires nor countenances such a charade.

Given that petitioners viewed the appraisal remedy as inadequate, they were surely justified in pursuing the alternative course that they reasonably believed was fair, *i.e.*, the common law claim for breach of fiduciary duty. Now that the Second Circuit's interpretation of that cause of action has resulted in an empty promise, petitioners are rightfully challenging that decision.

The threshold question as to standing is:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.

Baker v. Carr, 369 U.S. 186, 204 (1962). As to these petitioners, the question is overwhelmingly answered in the affirmative. *See also Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) ("requirement that party seeking review must himself have suffered an injury"). As a result of Delaware law, petitioners personally have suffered a serious injury by the payment of $150 for shares worth at least $456.

Respondents' citation to *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (DB 8) does no more than state the obvious that a litigant has

> standing to seek redress for injuries done to him, but may not seek redress for injuries done to others.

407 U.S. at 166. Petitioners who are seeking redress for the unconstitutional deprivation of property resulting

from the Second Circuit's interpretation of Delaware law on breach of fiduciary duty combined with the inadequacy of the appraisal remedy have alleged injuries to themselves. (*No* reading of the petition suggests that they are here solely to advance, in good nature, the position of the shareholders who proceeded with the appraisal remedy.)

Point III

The Petition Contains A Substantial Constitutional Question Which is of Nationwide Concern.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955) (DB 14) enunciates that the "special and important reasons" within the meaning of Rule 17 include resolution of issues reaching constitutional dimensions. Petitioners' showing that the decision below results in the taking of property without just compensation surely satisfies this interpretation. Moreover, while respondents correctly note that the certiorari jurisdiction is not to resolve questions of "isolated significance" (DB 14), they neglect to notice that the inadequacy of the appraisal remedy in many states makes this a recurring problem and not an isolated one. Brudney & Chirelstein, Fair Shares In Corporate Mergers and Takeovers, 88 Harv. L. Rev. 297, 306 (1974). See Pet. 9-10.[5]

Point IV

The Decision Below Interprets Delaware Law To Permit a Taking Without Just Compensation in Violation of the Due Process Clause.

Rather than answer petitioners' arguments, respondents introduce some new and irrelevant concepts related to validity of the statute on its face and as applied (DB

[5] Respondents disingenuously refer to this Court's opinion in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 465-66 (1977) (DB 14) in which the Court merely referred to the existence of the appraisal proceeding without any inquiry about whether it actually provided fair compensation.

8-10). Petitioners respectfully refer the Court to its original petition (Pet. 7-10).

With regard to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), if respondents are correct that there is no *Erie* violation because Delaware courts would have reached the same results (DB 11), then surely there has been a taking of property without just compensation. Stated otherwise, a conclusion by the Delaware court that petitioners have no remedy for this blatant fraud would be unconstitutional.

Contra respondents (DB 10-11), weighing of earnings and asset value by the Delaware appraisal method in *Bell v. Kirby Lumber Corp.*, 413 A.2d 137 (Del. 1980) resulted in a majority stockholder fiduciary forcibly purchasing from its minority stockholders cestui the equivalent of $456 cash in the bank per Kirby share for an appraisal value of $254.40 per Kirby share. (Pet. 10). Thus, where Delaware's appraisal remedy deprives minority stockholders of over $200 per Kirby share, that clearly constitutes a taking without just compensation.

Point V

The Petition is Timely and Proper.

Respondents' contention that the petition is untimely is totally unfounded. The fact that the extension of time was obtained in connection with evaluation of the case by new counsel whose name ultimately does not appear on the petition does not suggest otherwise. First, respondents misread the application for extension of time to file. The application refers to Kathryn A. Oberly's need "to evaluate this case" and to "familiarize herself with the extensive record." Respondents point to *no* commitment or representation, because the application contains none, that Ms. Oberly's name would ultimately appear on the petition. Second, respondents' argument amounts to the absurd proposition that if an extension of time is ob-

tained because of a good-faith effort to retain new counsel and that specific counsel's name does not appear on the petition—for whatever reason—the litigant has lost *all* his procedural and substantive rights. Neither law nor logic could sustain such a proposition.

Further, there is no basis for the imposition of sanctions for filing this timely and serious petition. In good faith, petitioners submit that the decision of the Second Circuit, which reversed itself and abandoned its own holding of fraud, resulted in a substantial due process violation for the first time. That decision interpreted Delaware law to permit majority shareholders to decide unilaterally to pay minority shareholders less than one-third the judicially determined asset value of their shares without giving the minority any adequate remedy.[6]

CONCLUSION

For the reasons stated herein and in the petition, the petition for the writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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[6] Respondents' repeated references to the other cases in which the courts have refused to grant relief to the minority shareholders highlight the grave injustice and emphasize the need for granting the writ of certiorari at this point. Surely, the cases provide no illumination on the merits of the constitutional violation.